No. 84-861

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO, *et al.*,
Respondents.

MOTION OF DELTA STEAMSHIP LINES, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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March 1, 1985

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Delta Steamship Lines, Inc. ("Delta") respectfully moves for leave to file the attached brief as *amicus curiae* in this case. Petitioner and all respondents supporting petitioner have consented to the filing of the attached brief; the remaining respondents oppose the filing.

Delta is currently involved in litigation against the International Longshoremen's Association, AFL-CIO ("ILA") in proceedings pending before the United States District Court for the Southern District of New York. Unlike the present proceedings, which address the operation of the Rules on Containers vis-a-vis off-pier concerns such as truckers and warehousemen, Delta's case examines the Rules as they

operate to restrict carriers who do not themselves employ longshoremen from utilizing non-ILA stevedoring facilities from Maine to Texas.

No definition of traditional longshore work—the definition of which is the sole issue before the Court—can render lawful ILA attempts to contract with non-employers to boycott non-ILA stevedoring companies at all ports on the East and Gulf coasts. Yet the Fourth Circuit's sweeping assertion that the Rules on Containers are "valid in all respects" could introduce ambiguity about the effect of that false conclusion on Delta's case. Only this court can erase the doubt by recognizing the limits of the issue before it. Without such recognition, this Court might, like the Fourth Circuit, prejudice ongoing challenges to the Rules that the Court has not had the opportunity to consider.

For these reasons, Delta requests leave to file its attached brief as *amicus curiae* in support of petitioner.

Respectfully submitted,

STEPHEN E. TALLENT
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BRIEF OF DELTA STEAMSHIP LINES, INC. AS *AMICUS CURIAE*

INTRODUCTION AND STATEMENT OF INTEREST

The Fourth Circuit's decision at issue held that the Rules on Containers are "valid in all respects." 734 F.2d 966, 968 (1984). Delta Steamship Lines, Inc. ("Delta") disagrees with that sweeping assertion and is currently engaged in litigation[1] against the

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[1] Delta Steamship Lines, Inc. v. International Longshoremen's Ass'n, No. 84 Civ. 8104 (S.D.N.Y. Nov. 9, 1984). Delta's suit is related to consolidated cases also pending in the Southern District of New York brought by the ILA to compel Delta to arbitrate and to confirm arbitration awards already rendered, notwithstanding the fact that no contractual basis for the arbitration or resulting awards exists between the parties. *See* In the Matter of the Arbitration between International Longshoremen's Association, AFL-

International Longshoremen's Association, AFL-CIO ("ILA") over whether the Rules are, instead, invalid in respects not envisioned by the Fourth Circuit. Delta's interest is to apprise the Court of issues about the Rules on Containers which the parties have not raised and which this Court should not appear to resolve adversely to Delta's position.

The decade of litigation questioning the lawfulness of the Rules has cut an exceptionally narrow doctrinal path. Grappling with the perimeters of traditional longshore work given the shifting interface between on-pier and off-pier labor, the National Labor Relations Board ("Board") and reviewing courts have left largely unexamined critical assumptions about the operation of the Rules vis-a-vis carriers themselves. Neither the Board nor the courts, for example, have examined the assumption that the Rules apply only to carriers who employ longshoremen, despite the fact that the present carrier-ILA agreement containing the Rules provides that they apply whether the carrier "employs" *or* merely "utilizes" longshoremen "actually employed" by unaffiliated stevedoring companies.[2] Nor has anyone questioned the presump-

CIO and Delta Steamship Lines, No. 84 Civ. 2493 (consolidated cases) (S.D.N.Y. April 9, 1984).

[2] The text of the carrier agreement more fully discussed below is set forth at Appendix A hereto. The distinction between carriers who "employ" longshoremen and those who merely "utilize" the services of unaffiliated stevedoring companies is found in the first "Whereas" clause of the agreement. Appendix A at 1a. The emphasis that the contract applies even though the longshoremen are "actually employed" by the stevedoring company rather than carrier signatory is found in paragraph 10 of Article II. Appendix A at 3a.

tion that the Rules operate as a general rule to protect (or acquire) work only for longshoremen within a "work unit" coextensive with a particular port such as the Port of New York or Port of Baltimore. In fact, a model union-signatory clause in the Rules prohibits carriers from contracting with non-ILA stevedoring companies in thirty-six ports from Maine to Texas.[3] By speaking broadly and by failing to recognize the hypothetical backdrop against which the work-definition issue has been framed, the Fourth Circuit erroneously transformed the conclusion that the Rules may be lawful if several assumptions hold into the conclusion that the Rules "are valid in all respects."

ARGUMENT

In January of 1984, the Rules on Containers were incorporated in a new collective bargaining agreement that clarified and expanded the Rules' restrictions on carrier use of non-ILA stevedoring facilities. As an outgrowth of the latest round of negotiations between the ILA and seven management associations, an agreement was reached descriptively entitled "Agreement between International Longshoremen's Association, AFL-CIO and Undersigned Steamship Carriers Subscribing to the Master Agreements and Agreements with New York Shipping As-

[3] The Board has recognized, unlike the Fourth Circuit, that the Rules are unlawful to the extent they seek to preserve work outside a work unit defined roughly in terms of the longshoremen identified with a particular port such as the Port of New York. *See* Pet. App. at 91a, 91a n.17, 182a n. 97, 183a-186a. The Board, however, has not examined the requirement in the Rules that carriers cease doing business with non-ILA stevedoring companies from Maine to Texas.

sociation, Inc., Council of North Atlantic Shipping Associations, South Atlantic Employers Negotiating Committee, Southeast Florida Employers Association, Mobile Steamship Association, Inc., West Gulf Maritime Association, [and] New Orleans Steamship Association."[4] This new carrier-ILA agreement (herein referred to as the "January 25 Agreement") expressly requires carriers to recognize the ILA as the "exclusive Collective Bargaining Agent for all longshoremen . . . employed or utilized by such steamship carriers . . . in such 36 ports designated herein . . . ." Appendix A at 2a. The January 25 Agreement further requires carriers "to subscribe to and become parties to" each of the port or regional ILA agreements and, redundantly, specifically to the "Rules on Containers." Appendix A at 3a.[5] ILA reserves in the agreement "the right to refuse to supply labor and to picket or otherwise hinder the operation of the steamship carrier" who refuses to subscribe to the January 25 Agreement and each of its component agreements, including the Rules on Containers.

By incorporating the Rules in this new thirty-six port agreement—to which all carriers utilizing even

[4] *See* Appendix A. The well-recognized and stated purpose of this agreement was to prohibit all carriers utilizing even one ILA port on one occasion from thereafter utilizing any non-ILA stevedoring facility in thirty-six designated ports whether or not the carrier is or has ever been a member of even one of the listed management associations.

[5] Since the Rules on Containers are simply uniform terms incorporated into each of the several local collective bargaining agreements covering the particular geographic areas of defined ports, the January 25 Agreement's demand that carriers subscribe to each of these local agreements independently binds carriers to the Rules on Containers in every port.

one ILA port must subscribe—two unlawful applications of the Rules clearly emerge. The first is the application of the Rules to (and by) carriers who do not employ longshoremen represented by the ILA and who thus cannot lawfully contract with that union to cease doing business with anyone. The second arises most dramatically from the inter-port application of the Rules expressly provided for in the January 25 Agreement.

I.

The ILA Cannot Lawfully Contract With Nonemployers For Compliance With The Rules On Containers

In *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612 (1967), the Court stated that the "touchstone" for determining the primary or secondary character of an agreement whereby an employer agrees to cease doing business with others is whether the agreement is "addressed to the labor relations of the contracting employer vis-a-vis his *own employees.*" *Id.* at 645 (emphasis added). As this test recognizes, an employment relationship between the contracting company and the employees represented by the contracting union is a *sine qua non* for a lawful agreement.

This fundamental limitation on the scope of legitimate boycott activity was reaffirmed by this Court in *Connell Construction Co.* v. *Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). In *Connell* the Court held that a union violates Section 8(e) of the National Labor Relations Act (the "Act") if it contracts with a nonemployer to exclude nonunion contractors. The Court upheld the contention that "Congress did not intend to permit a union to

approach a 'stranger' [*i.e.*, nonemployer] contractor and obtain a binding agreement not to deal with non-union subcontractors." *Id.* at 627-28. But what Local 100 was barred from doing in *Connell* is precisely what the ILA accomplishes by incorporating the Rules on Containers in the January 25 Agreement, which expressly grants ILA the "right" to cause non-employer as well as employer carriers to subscribe to Rules that in turn forbid them from contracting the stevedoring work to companies utilizing non-ILA labor.[6]

II.

The Rules On Containers Embody A Union-Signatory Clause Expressly Prohibiting Carriers From Utilizing Any Non-ILA Facility From Maine To Texas

The Preamble to the Rules on Containers provides that signatory carriers will not "contract out" the work of loading and unloading containers from and to the ships "unless such work on such container waterfront facility [*i.e.*, any pier from Maine to Texas] is performed by employees covered by Management-ILA Agreements." This provision is a model union-signatory clause of precisely the kind repeated-

[6] As the January 25 Agreement recognizes, carriers structure their operations differently. Some hire longshoremen directly. Others, called integrated operators, hire longshoremen indirectly through affiliated stevedoring companies. Yet others choose to contract out the stevedoring work to independent, unaffiliated contractors. To hold that this last group of carriers "employ" longshoremen merely because they utilize the work force of independent contractors would, of course, go well beyond any existing definition of the employment relationship. *See* NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).

ly held to violate Section 8(e) of the Act. *See, e.g., Pacific Northwest Chapter of Associated Builders and Contractors, Inc.* v. *NLRB,* 654 F.2d 1301, 1307 (9th Cir. 1981) (en banc), *aff'd in part, vacated and remanded on other grounds sub nom. Woelke & Romero Framing, Inc.* v. *NLRB,* 456 U.S. 645 (1982) ("union signatory clauses . . . are secondary in objective . . . for they are intended to satisfy union objectives involving employees and employers outside of the bargaining or work unit"); *Heavy, Highway, Building and Construction Teamsters Committee,* 227 NLRB 269, 272 (1976) (union-signatory clauses "viewed as not being designed to protect . . . unit employees . . . but as directed at furthering general union objectives").

The above-quoted union-signatory provision from the Rules fits the spirit as well as the letter of prohibitions on clauses allowing subcontracting only to employees represented by a particular union. The anti-competitive impact of prohibiting a carrier who, for example, utilizes ILA labor in the Port of New York from thereafter utilizing any non-ILA stevedoring company from Maine to Texas is obvious and severe. By locking all carriers into utilizing only ILA facilities, the union effectively ensures the death of any incipient competition from stevedoring companies whose employees choose not to be represented by the ILA. Thus this union-signatory clause—like all others—operates as intended: impermissibly to advance the union's interests rather than the interests of employees within the work unit.[7]

[7] The ILA cannot, of course, elude the union-signatory conclusion by merely arguing that the "work unit" is coterminous with

CONCLUSION

Delta's objective here is not to develop fully its pending challenges against the Rules on Containers or to interject new issues into this proceeding, but rather to provide the Court with a perspective on the Rules that the present dispute overlooks. A more complete understanding of the operation of the Rules reveals that this is ultimately not a case solely of "we" (*i.e.*, carriers, stevedores, and the ILA) against "them" (*i.e.*, truckers, warehousemen, and other off-pier concerns). It is also a case of a union's monopoly on stevedoring services acquired through years of reaching beyond the genuine employers of longshoremen—the stevedoring companies—to form unlawful relationships with the customers of those employers. In the course of answering the narrow question of how to define the traditional work of longshoremen, Delta respectfully requests that the Court not provide an unintended signal to lower courts to validate applications of the Rules in situations not addressed in these proceedings.

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the coast wide reach of the union-signatory clause, since to accept this circular defense would "permit precisely what [section 8(e)] was intended to prohibit." NLRB v. Joint Council of Teamsters No. 38, 388 F.2d 23, 28 (9th Cir. 1964); *see* Pacific Northwest Chapter v. NLRB, 654 F.2d 1301, 1308 (9th Cir. 1981) (en banc) *aff'd in part, vacated and remanded on other grounds sub nom.* Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645 (1982); NLRB v. National Maritime Union, 486 F.2d 907, 914 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); In re Bituminous Coal Wage Agreements Litigation, 580 F. Supp. 670, 680 (W.D. Pa. 1984).

Respectfully submitted,

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Of Counsel:

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GIBSON, DUNN & CRUTCHER

March 1, 1985

APPENDIX

APPENDIX

AGREEMENT

between

INTERNATIONAL LONGSHOREMAN'S ASSOCIATION, AFL-CIO

and

UNDERSIGNED STEAMSHIP CARRIERS SUBSCRIBING TO THE
MASTER AGREEMENTS AND AGREEMENTS WITH
NEW YORK SHIPPING ASSOCIATION, INC.
COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS
SOUTH ATLANTIC EMPLOYERS NEGOTIATING COMMITTEE
SOUTHEAST FLORIDA EMPLOYERS ASSOCIATION
MOBILE STEAMSHIP ASSOCIATION, INC.
WEST GULF MARITIME ASSOCIATION
NEW ORLEANS STEAMSHIP ASSOCIATION

This Agreement made this 25th day of January, 1984 by and between the undersigned Steamship Carriers and the International Longshoremen's Association, AFL-CIO for itself and on behalf of all of its affiliated Locals in all 36 ILA ports on the North Atlantic, South Atlantic and Gulf Coasts of the United States

WITNESSETH:

WHEREAS, the Steamship Carriers and the Management Associations recognize the International Longshoremen's Association, AFL-CIO (ILA) as the exclusive Collective Bargaining Agent for all longshoremen, clerks, checkers, maintenance men and other related deep sea craft employees employed or utilized by such steamship carriers to load and unload their

steamship vessels in such of the 36 ILA ports designated herein in which such carriers load or unload their ships, and

WHEREAS, the parties hereto desire to set forth the nature and scope of the relationship between the parties on all Master Contract issues and Local Contract issues in all said ILA ports;

NOW THEREFORE the parties agree as follows:

1. The ILA is recognized as the exclusive Collective Bargaining Agent and representative of all longshoremen, checkers, clerks, maintenance men and other ILA craft employees employed or utilized by such Steamship Carriers in loading and discharging of cargo on all of their ships engaged in the foreign or domestic trade of the United States to the extent and when they call at any of the 36 ILA ports designated in Appendix A.

II. Said Steamship Carriers by executing this Agreement hereby subscribe to and become parties to the following Agreements and any amendments thereto with the same force and effect as if said Steamship Carrier actually executed, signed and subscribed to said Agreements. Said Agreements are the following:

1. The Master Agreement first executed May 27, 1980 as thereafter amended on April 16, 1983 and on September 26, 1983.
2. The Management ILA Agreement dated December 6, 1980.
3. The Resolution of March 26, 1981.
4. The Tampa Agreement of May 4, 1981.

5. The Charleston Agreement of May, 1981.
6. The Work Incentive Agreement of June 19, 1981.
7. The Rules on Containers as now in effect and as may hereafter be amended in accordance with its terms.
8. The Containerization Agreement.
9. The JSP Agreement.
10. Each and every Local Agreement which may hereafter be entered into or which is presently in effect in each of said 36 ILA ports affecting the terms and conditions of employment of employees actually employed or utilized aboard the steamship vessels of said Steamship Carriers.

III. The Steamship Carriers agree to be bound by the determination of the various management and labor tribunals named in each said Master and Local Agreements.

Any determination of the tribunal named in the Master Agreement or in any of the Local Agreements shall have the effect of an arbitration determination and may be enforced by either party in any Federal District Court having jurisdiction of the parties.

IV. Nothing contained herein shall require any carrier to be liable for any contributions to any ILA fringe benefit funds not required to be paid by such carrier, if it employs a stevedore who has given sufficient surety to pay such stevedore contributions to such funds if the carrier has paid the stevedore under the stevedoring contract.

V. Should any carrier fail or refuse to sign or having signed and subscribed to this Agreement refuse to abide by any determination duly issued in accordance with this Agreement and the Agreements made a part hereof, then and in that event on 24 hours telephonic or written notice, the ILA shall have the right to refuse to supply labor and to picket or otherwise hinder the operation of the steamship carrier to the full extent permitted by applicable law.

IN WITNESS WHEREOF the parties hereto have signed this Agreement by their principal officers and in the event of a signature by an Agent, such Agent shall append hereto a written authorization from the carrier authorizing the execution of this document.

Dated in the Port of Miami, and the State of Florida, on this 26th day of January 1984.

CARRIER:
Sea Land Svc. Inc.
By: /s/ Louis W. Macijeski

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO
By /s/ Thomas W. Gleason
President

CARRIER:
United States Lines, Inc.
By: /s/ Robert B. Murphy

ATLANTIC COAST DISTRICT
ILA, AFL-CIO
By /s/ Thomas W. Gleason

CARRIER:
USL (SA)
By: /s/ Robert B. Murphy

SOUTH ATLANTIC AND GULF DISTRICT, ILA, AFL-CIO
By _____
President

CARRIER:
B.S.S.L. Inc. as agent for
Barber Blue Sea
By: /s/ F. M. Cangemi

NEW YORK SHIPPING ASSOCIATION
By /s/ James J. Dickman
President

CARRIER:
B.S.S.L. Inc. as agent for
Barber West Africa Line
By: /s/ F. M. Cangemi

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATION
By /s/ William Detweiler
President

CARRIER:
B.S.S.L. Inc. as agent for
Atlantik Express Service
By: /s/ F. M. Cangemi

WEST GULF MARITIME ASSOCIATION
By /s/ O. H. Hall
Chairman

CARRIER:
Flota Mercante
Grancolumbiana S.A.
By: /s/ H. R. Whitehouse,
attorney in fact

NEW ORLEANS STEAMSHIP ASSOCIATION, INC.
By /s/ C. D. Burns
President

CARRIER:
Atlantic Container Line
By: /s/ [illegible signature]

MOBILE STEAMSHIP ASSOCIATION
By /s/ F. D. Alspaugh
President

CARRIER:
T.F.L.
By: /s/ [illegible signature]

SOUTHEAST FLORIDA EMPLOYERS ASSOCIATION
By /s/ R. O. White, Jr.
Chief Negotiator

CARRIER:

By: _____

SOUTH ATLANTIC EMPLOYERS NEGOTIATING COMMITTEE
By /s/ James I. Newsome, Jr.
Chairman

CARRIER:

By: _____

CARRIER:

By: _____